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# Torts - Landlord-Tenant

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as to the delegation of a power, it should be resolved against the existence of the power) the legislative provision delegating flexible zoning authority to the planning commissions of only second class cities and failing to delegate it to any other municipal government, leads to the conclusion that it was the legislative intention to withhold such flexibility from the powers of borough planning commissions.

In summary it can be said that several serious questions and problems are created by the instant decision. By what standards is the New Hope Borough Planning Commission to determine whether proposed uses will be approved by it? By what standards is the Commission to accept or reject proposed density of dwelling units? Suppose the Planning Commission favors one form of open space over another set forth in the over-all plan? In brief, the PUD ordinance is completely devoid of any indication of a standard by which the Planning Commission of New Hope Borough is intended to grant or withhold the approval authorized by ordinance 160. It is submitted that this ordinance, and court's decision, created possible dangers by granting to a planning commission the power to thwart arbitrarily a developer's plan, as well as the power to arbitrarily grant approval without limit or restraint.

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TORTS—LANDLORD-TENANT—The Supreme Court of Pennsylvania has held that a lessor is liable in trespass for non-performance of a promise to repair which he orally made at the time of execution of the lease.

*Reitmeyer v. Sprecher*, 431 Pa. 284, 243 A.2d 395 (1968).

Appellants executed a written lease for a row house property owned by appellee. When the lease was being negotiated appellants pointed out the defective condition of the wooden porch floor. At the time of execution of the lease, and allegedly in consideration thereof, appellee orally promised to repair the defective portion of the porch. In reliance upon such promise, appellants executed the lease and took possession of the premises. Two months after the entry of the appellants, and after alleged repeated promises to repair by appellee, appellant, Mrs. Reitmeyer, injured herself in a fall from the defective porch.

Appellants instituted an action in trespass in the Court of Common

Pleas of Union County by filing a complaint to which defendant filed preliminary objections in the nature of a demurrer. The preliminary objections were sustained and the complaint dismissed. On appeal, the Pennsylvania Supreme Court, Justice Jones writing for the majority and only Chief Justice Bell dissenting, reversed the lower court and existing precedent, and found for the appellants.

In considering this case the court focused on one narrow issue: Is a landlord liable in tort for physical harm to his tenant caused by a defect in the leased premises which existed, and which the lessor orally promised to repair, at the time the lease was executed? The first consideration incumbent upon the court was *Harris v. Lewistown Trust Company*,[1] where thirty-one years ago the court decided on what it conceded to be "*substantially* similar facts," that such a promise does not impose tort liability upon the non-performing landlord. As in the instant case, the promise there was made at the time the lease was executed, but was held to be gratuitous.

In opposition to the *Harris* rule is the view expressed in the Restatement,[2] which is considered to be the minority view.[3] This view would impose liability in the *Harris* situation. While the Restatement specifically exempts gratuitous promises,[4] it does imply that the promise of a landlord *may* constitute a contractual obligation. This may be true even though the promise is not included as a term or covenant of the lease itself, and even if it is made after entry upon the premises by the tenant.[5]

The situation in *Harris* was "substantially" the same situation as faced the court in the instant case. At the time of lease negotiation, the landlord promised to repair a defective stairway. Thirteen months later

1. 326 Pa. 145, 191 A. 34 (1937).
2. RESTATEMENT (SECOND) OF TORTS § 357 (1965), [Hereinafter cited as RESTATEMENT]. A lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if
   (a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and
   (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and
   (c) the lessor fails to exercise reasonable care to perform his contract.
3. *Comment (a)* of § 357 of the RESTATEMENT, states that "[t]he rule stated in this Section has thus far been adopted by only a minority of the American courts, and is still rejected by a majority of the courts which have considered it."
4. RESTATEMENT § 357 *comment (b)*1.
5. RESTATEMENT § 357, *comment (b)*1, which states that "the rule has no application where there is . . . merely a gratuitous promise to repair, made *after* the lessee has entered into possession. The contract need not, however, be a . . . term of the lease, and it is sufficient if it is made by the lessor, as such, after possession is transferred."

the tenant's wife was injured in a fall from that stairway. In a complete discussion of the applicable law in Pennsylvania,[6] the *Harris* court stated that the modern rule opposing tort liability is founded upon the English case of *Pope v. Cavilier.*[7] Fundamentally this contrary view is based upon the conclusion that liability in tort should follow as a legal incident of occupation and control, and that neither occupation nor control is retained through an agreement to repair.[8] Just prior to the *Harris* decision there was some apparent confusion as to the state of the law in this area. The plaintiff in *Harris* relied upon the case of *Zimmerman v. Homer Building & Loan Association.*[9] In *Zimmerman* the landlord promised and did in fact repair a defective ceiling. When the ceiling later collapsed the injured tenant successfully sued for damages. On appeal, the Superior Court affirmed the lower court's holding of landlord malfeasance. The court noted, however, that the promise to repair was in exchange for the tenant's promise to remain. As such, the exchange could be viewed as an entirely new contract.

The case of *Deutsch v. Max*[10] seemed to add further confusion to the law in this area. That case involved injuries to the tenant's employee as a result of an obviously defective condition which the landlord had promised to repair. While the court considered the condition to be a nuisance as applied to the employee, the dicta led many to believe that a landlord was liable in tort to his tenant for failure to perform on a promise to repair.[11] The court in *Harris* was again faced with an injured employee of the tenant. But in *Harris* the employee was also the wife of the tenant, and the court believed that a just result could only be achieved by reversing its holding in the *Deutsch* case.

If any doubt remained as to the state of the law after *Harris,* it was swept away when the court rendered its opinion in *Hayden v. National Bank of Allentown.*[12] In speaking of the principles enumerated in *Harris,* the court stated that "from them we have no intention to depart."[13] In addition to *Harris* and *Hayden* the court in the instant case had to consider that within this same year the dicta in *Kolojeski v.*

6. 326 Pa. at 147, 191 A. at 35.
7. [1905] 2 K.B. 757.
8. It seems that this view was first expressed in Pennsylvania by the case of Early v. Ashworth, 17 Phila. R. 248 (1883).
9. 111 Pa. Super. 345, 170 A. 703 (1934).
10. 318 Pa. 450, 172 A. 135 (1934).
11. See 85 U. PA. L. REV. 745 (1937).
12. 331 Pa. 29, 199 A. 218 (1938).
13. *Id.* at 31, 199 A. at 219.

*Deisher Inc.*,[14] quoted the opinion in *Keiper v. Marquart*[15] wherein the *Harris* rule was again reaffirmed.[16]

Notwithstanding the solid foundation upon which *Harris* was built and the number of times it was reaffirmed, the court in the instant case felt compelled to alter its position and adopt the Restatement position.

Section 357 of the Restatement enumerates the situations in which a lessor may be held liable in tort, one such situation being when "the lessor, as such, has contracted . . . in the lease or otherwise to keep the land in repair."[17] The majority in *Reitmeyer* summarized the reasons advanced by the Restatement in support of imposing liability upon lessors,[18] and in the opinion of the court the reasons advanced were sound with the possible exception of the fictitious "control" theory.[19] In the majority's view the Restatement takes the position that while a landlord retains no right to "control" the use of the land, his agreement to repair does reserve to him a form of "control" over the premises.

More important, the majority opinion believed that "critical social and economic changes" have taken place since the time when *Harris* was decided. Paramount among these changes was the belief by the court that a prospective tenant is in a disadvantageous position vis-à-vis his prospective landlord due to an acute housing shortage. The end result is the prospective tenant's inability to deal on an "arm's length" basis.

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14. 429 Pa. 191, 194, 239 A.2d 329, 330 (1968).

15. 192 Pa. Super. 88, 91, 159 A.2d 33, 35 (1960). The *Keiper* court also stated at 192 Pa. Super. 91, and 159 A.2d 35, that "[i]t is also settled law that an agreement to repair does not impose upon the owner a liability in tort at the suit of the tenant; and that occupation and control are not reserved to the owner by his agreement to repair."

16. The court in the instant case mentioned this in a footnote. See n.7, at 291 of 431 Pa. 284 and at 398 of 243 A.2d 395 where the court stated it thusly: "Unfortunately, *in dicta*, this Court very recently in Kolojeski v. Deisher Inc., . . . quoted with approval Keiper v. Marquart, . . . which reaffirmed the *Harris* rule. Such dicta should not be considered as authoritative."

17. RESTATEMENT § 357(a).

18. 431 Pa. at 288-9, 243 A.2d at 397. The court gave five of the reasons advanced by the Restatement: (1) Tenants who lease premises that are defective are likely to be somewhat indigent and thus unable to afford to make repairs; (2) because of the "special relationship" between the parties there is the possibility that the tenant will rely on the landlord to make the necessary repairs; (3) "the landlord retains a form of 'control' over the premises"; (4) The landlord has a duty based upon a contract which is "cognizable in tort and the landlord should be liable if his failure to make repairs in accordance with his undertaking is due to his failure to exercise reasonable care to that end"; (5) since an apartment can be used safely "only if light and heat is provided and in the lease the landlord agrees to provide such service, the landlord should be subject to liability for bodily harm caused by a failure to exercise reasonable care to make the premises safe."

19. RESTATEMENT § 357, *comment (b)*3.

The fact that the lessor retains a reversionary interest in the land, and so by his contract may properly be regarded as retaining or resuming the duty and responsibility of keeping his own premises in safe condition, to the extent of his undertaking.

Thus, because of the "critical social and economic changes," and the Restatement's considerable influence upon Pennsylvania courts,[20] it is not surprising that the court decided to overthrow the *Harris* rule.[21]

It is submitted that the "critical social and economic changes" was the major factor in leading the court to find for the tenant. Assuming such changes to be a fact, was that sufficient reason to suddenly decide that a landlord-to-be and a tenant-to-be no longer deal at "arm's length"? If the tenant is truly in a disadvantageous position, and the landlord in fact has all the bargaining power, why then would the landlord feel compelled to make any promise at all? It is submitted that if these factors were true, the all-powerful landlord would deal strictly on a take-it-or-leave-it basis.

Aside from those considerations it seems that the weakness of the instant decision is to be found not so much in the reasoning or rationale of the majority, but rather in the questions they left unanswered. When the court adopted the Restatement position that a landlord is liable on his contract to repair, it has adopted nothing new. The Restatement presupposes the existence of a binding contractual relationship and specifically excludes gratuitous promises.[22] The question to be answered in the instant case seemed to be not whether a lessor is liable on his contract, but rather whether a contract in fact existed.

If the majority was determined to find for the appellant it had three possible alternatives from which to choose: first, the court could have viewed the landlord's promise as a term of the leasing contract; second, it could have viewed the landlord's promise as binding because of the detrimental reliance on the part of the tenant; or third, it could have found an entirely separate and distinct contract arising out of a promise to repair in exchange for the tenant's promise to remain in possession.

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This frequently is expressed by the courts as a retention of "control" over the premises by the lessor. The lessor does not, however, retain any right to exclude anyone from the land, or to control the use of it; and his privilege to enter under his contract differs from that of any other contractor only in that he agrees to repair his own land, and stands in a special relation to the lessee.

20. In Florey, *The Restatement of Torts in Pennsylvania 1939-1949*, 22 PA. B. ASS'N Q. 79 (1950), the propensity of the Pennsylvania Supreme Court to follow not only the leadership, but in many instances the exact verbage of the Restatement is discussed at length.

21. See n.5, at 289 of 431 Pa. 284, and at 397-8 of 243 A.2d 395, where the court in support of its position pointed out that on two occasions prior to *Harris*, the general rule exempting landlords from liability had not been followed. Those two occasions according to the court were Cunningham v. Rogers, 225 Pa. 132, 73 A. 1094 (1909), and Harte v. Jones, 287 Pa. 37, 134 A. 467 (1926). However, both cases involved the liabilities of a landlord to third parties as a result of his promise to repair.

22. See note 5, *supra*.

In finding the lessor liable, the majority never clearly stated the basis of its decision. Since the court found it necessary to overrule *Harris*,[23] it might be assumed that the case turned on the fact that the alleged promise was a term of the leasing contract. But the court in no instance specifically found such to be the case.

The majority opinion mentioned that in the allegations, the landlord's promise acted as an inducement to the appellant's executing the lease.[24] The court then proceeded without any further discussion on that point, and concluded that the landlord can properly be held liable on his promise. Is it to be assumed that the otherwise gratuitous promise was made binding because of the appellant's detrimental reliance, or was there a new contract created, separate and distinct from the written lease? The court did not seem to make this clear in the instant opinion.

It is submitted that in either case, the instant situation would be clearly distinguishable from *Harris* and thus there would have been no need to overrule it. It is also submitted that the court could have found the landlord liable based on a separate contract and still have been consistent with the Restatement position. In addition, by finding a separate contract the majority could have relied upon the *Zimmerman* case[25] as precedent. By choosing to overrule *Harris*, the dissent reasoned that the majority has unnecessarily thrown the law into a state of confusion at the expense of stare decisis.[26]

In summary it is submitted that what was formerly considered to be a gratuitous promise has now become a binding contract (or term of a contract), and without a definite statement as to how the transformation came about.

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23. "To the extent that Harris v. Lewistown Trust Co. and Hayden v. Second National Bank of Allentown are in conflict with the Restatement 2d, Torts, § 357, they are hereby expressly overruled." 431 Pa. at 291, 243 A.2d at 398.

24. 431 Pa. at 290, 243 A.2d at 398.

25. 111 Pa. Super. 345, 170 A. 703 (1934).

26. Chief Justice Bell in his dissent stated at 293 of 431 Pa. and 399 of 243 A.2d: "What is the use of talking about Stare Decisis, or increased litigation, or the terrible backlog of cases, if a majority of this Court bury Stare Decisis at their daily or weekly or monthly *wish* or *whim?*"